No. 3675

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FRANK P. HELM,

Plaintiff in Error,

vs.

AMERICAN HAWAIIAN STEAMSHIP COMPANY (a corporation),

Defendant in Error.

PETITION FOR A REHEARING ON BEHALF OF PLAINTIFF IN ERROR.

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

It is with great diffidence and regret that I am imposing upon the patience of the court in this matter, but I feel that the prevailing opinion proceeds not only upon an erroneous view of the case, but also fails to give consideration to some of the essential points contained in the record for review. I regret exceedingly that my illness prevents me from presenting the matter as completely as I desire, but in order to keep faith with the court in the promise, that I understand was made at the

time of the last extension of time to file this petition, I am rushing this incomplete, and to me not entirely satisfactory petition, in the hope that I may possibly supplement it, if my strength will permit, before the time when, in the regular course, the court will be prepared to pass upon it.

As we read the prevailing opinion, it seems to us to be based upon a misapprehension of what the contract required of the plaintiff in the way of a guarantee. The meat of that decision lies in the following language:

> "It is contended that by those portions of the instructions the court erroneously shifted to the plaintiff the burden of proof which rested upon the defendant to prove the plaintiff's inability to perform. But the burden of proof was upon the plaintiff to *show* his *damages.* There could be *no damage* to him from the breach of the contract unless he was ready, willing and able to perform upon his part. He recognized that fact in drawing his complaint, wherein he alleged his ability and readiness to perform. He wholly failed to prove a *tender* of a guarantee *within the terms of the contract,* or to prove his ability to furnish *such a guarantee.* We find no error, therefore, in the instructions."

It plainly appears from the foregoing that the court had in mind, without giving it form, some definition of "a guarantee within the terms of the contract" which it was necessary for the plaintiff "to prove his ability to furnish."

In the beginning of the opinion it is said:

> "the plaintiff's own testimony showed conclusively not only that he wholly failed to furnish or offer to furnish *the guaranty,* but that he did not

> regard the contract as requiring him to furnish a guaranty *in the sum* of $525,000, which sum he admitted to be 'the amount of the hire money for the two round trips.' The evidence showed that what the plaintiff was proposing to do in compliance with his contract to furnish a satisfactory guaranty was to obtain from prospective shippers contracts," etc.

The foregoing assumes that the required guaranty "within the terms of the contract" was one "*in the sum* of $525,000"—that is, an absolute undertaking *in that sum* to secure the hire money for the two round trips; and that the contracts for the carriage of the cargoes together with a month's money placed in escrow in the International Banking Corporation and a bond of $120,000 (Rec. pp. 41, 42) could not possibly be "a guaranty within the terms of the contract."

In the first place, the statement in the opinion that the

> "evidence showed that what the plaintiff was proposing to do in compliance with his contract to furnish a satisfactory guaranty, was to obtain from prospective shippers contracts for shipment of freight on the steamer *and by means of such* contracts *to obtain for the defendant an indemnity bond* from a guaranty company in the sum of $120,000 and to raise cash sufficient to place in escrow for the defendant $115,000, a sum equal to one month's charter hire",

is a plain misunderstanding of the testimony. What Captain Helm said was (Rec. pp. 41, 42):

> "The guaranty that previous to March 2nd I had told Captain Lapham I would give, consisted of a month's money placed in escrow in the International Banking Corporation, a bond for $120,000, *and these contracts.* The total of the *three different constituent parts* was the guaranty; one was a bond."

It is plain that the court was misled into adopting the construction placed upon this language by the appellee in his brief, which does not find warrant in the language of the record. The *contracts* were distinctly tendered as a part of the security, and who shall say that such a guaranty would not be "satisfactory" "for the amount of hire money"?

The *terms of the contract* on which this action is based, *did not* * * * require "him to furnish a guaranty *in the sum* of $525,000", but required him to furnish "a *satisfactory* guaranty to the owners *for* the amount of hire money", etc.

Now, as above shown, the plaintiff *did tender some* guaranty to the defendant. The defendant did not object that it was unsatisfactory either in the nature of the guaranty or in the amount, but held out for a guaranty outside of the contract, which the court instructed the jury was "more burdensome than the guaranty provided for in the original contract of the parties", and one which the plaintiff was under no obligation to execute.

The question is thus left open in the case as to whether or no the guaranty offered by the plaintiff would have been a "*satisfactory* guaranty to the owners *for the amount of hire money.*" We lay stress upon the fact that the contract did not require a guaranty "*in the sum* of $525,000", the amount of the hire money, but required a guaranty "for" that amount *satisfactory* to the owners. So long as it was "satisfactory" to the owners, the *amount* was immaterial. But they did not reject it as not a "satisfactory guaranty * * *

for the amount of the hire money", but they were asking for a guaranty outside of and beyond the terms of the contract.

It is not for the court to say that what was offered them would not have been "satisfactory" "within the terms of the contract." So far as the record stands, that *was* "a tender of a guaranty *within* the terms of the contract."

Another, and perhaps more convincing suggestion that the prevailing opinion is wrong, lies in the fact that the court in its opinion concerned itself alone with the instructions, and *paid no attention to the assignments of error on the question of admission and rejection of evidence.*

Assuming, for the sake of argument, that the court's instruction as to ability was right, the finding of the jury is based on the conclusions to be drawn from the law as applied to the facts. The *jury* must, according to the instruction of the court, find the *fact* of ability to perform.

> "If he has failed to establish *that fact* to your satisfaction by a preponderance of the testimony, he cannot recover, because in contemplation of law he has suffered no injury." (Rec. p. 105.)

Now, the finding of "that fact" *rests upon the testimony admitted,* and if the testimony touching "that fact" is erroneously admitted, the finding of the jury thereon is vitiated. It is not in the province of the appellate court to make a finding of fact, as this court does (upon what is under the rules of the court necessarily a partial record of the testimony), that

> "He wholly failed to prove a tender of a guaranty within the terms of the contract, or to prove his ability to furnish such a guaranty."

That was a question entirely for the jury *upon the whole record* which was before it, and *not* before this court. *Only a part of that record* is before this court. This is in accordance with the rules which require that only enough of the testimony to illustrate the errors assigned, be included in the record.

Now, it is true the jury is presumed to have found in accordance with the instruction of the court that plaintiff did not prove ability to perform. But if that finding is based upon testimony erroneously admitted, it cannot be accepted as conclusive. It does not, however, rest with the appellate court to make a finding upon the subject. The cause should be resubmitted to the jury upon a trial where the erroneous testimony is excluded.

As suggested in our opening to our reply brief,

> "Defendant's main argument is an attempt to convince this court that, *as a matter of fact,* plaintiff did not have the ability to perform",

and it seems that he has succeeded in doing what we then suggested he was attempting to do, namely, sidetrack the question as to whether or no the rulings of the court *on the admissions or rejections of testimony* was error. His argument, as we then said, was

> "addressed to a discussion, *not of the exceptions* which are the subject of the appeal, but was an attempt to treat this appeal as a trial *de novo*,"

and if we may be pardoned the suggestion, we think that this court has fallen in with that idea.

We said in our reply brief (p. 22) under the heading "ABILITY TO PERFORM AS A MATTER OF FACT", that

> "we must assume that the jury found, *as a matter of fact*, want of ability to perform, and *because this finding of fact followed from* the instructions AND RULINGS complained of, it points the injury which is the basis of this appeal".

In the same connection we further said:

> "It does not, therefore, help in the determination of this appeal, to discuss this question of fact so persistently as defendant does, and under these circumstances we can conceive of no purpose in so doing, other than an attempt to create an unconscious mental bias. *This situation, we feel is always sufficiently corrected by calling attention thereto.*"

It now appears that we fell into error in trusting that counsel's statements of fact could thus be corrected by a mere suggestion. The entire opinion rests upon an assumption of fact that the plaintiff's testimony showed conclusively that he failed to furnish or offer the guaranty, and that

> "he wholly failed to prove a tender of a guaranty within the terms of the contract, or to prove his ability to furnish such a guaranty."

The record, however, is replete with assignments of error regarding the admission and rejection of evidence upon this subject, and the question before this court was not a question as to whether or no the plaintiff *proved* one thing or another, but a question of law as to whether or no the assignments of error are well taken.

Now, upon this question of ability, the jury *must have been led to find want of ability upon evidence which was admitted,* and which is plainly inadmissible. We refer as a glaring instance, to testimony admitted over our objection, of a proposed charter with Hind, Rolph & Co. between the dates of March 31st and April 4th, which testimony followed an offer

> "to prove by this witness that on March 31, 1916, a refusal was given to Captain Helm by Hind, Rolph & Company, a steamship company here, giving him three days to obtain from the International Banking Corporation a guaranty in the amount of $55,000; that option was from March 31 to April 4; that Captain Helm was unable to produce to the International Banking Corporation any security or any guaranty during that time, and that thereafter it was extended to April 6th and he was unable to produce any security of any character during that time, and the option was then terminated." (Rec. pp. 56, 67, 74.)

As said in our original brief (pp. 38, 39),

> "Inasmuch as the contract in suit was entered into on February 28th, and was cancelled by defendant on March 3rd, any testimony concerning the ability of the plaintiff to obtain a guaranty in another transaction *after the latter date,* to-wit: between March 31st and April 6th, is necessarily immaterial, and it was error on the part of the court to admit the same."

We think this proposition is beyond a doubt, and yet the court took no notice of it.

There are other objections to testimony of a similar nature in the record, and referred to in our opening brief, of which no notice was taken. I cannot at this

time reproduce them in detail on account of my physical condition and the short time allowed within which to put this petition into print. However, if opportunity presents, I will, as already suggested, supplement the petition. If I fail in doing so, the record is exceedingly short, and it may not be asking too much of the court to turn to the record for first-hand information upon the subject.

Dated, San Francisco,
April 15, 1922.

Respectfully submitted,

NATHAN H. FRANK,
Attorney for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
April 15, 1922.

NATHAN H. FRANK,
Of Counsel for Plaintiff in Error and Petitioner.